36TH CONGRESS, 1st Session. } SENATE. { REP. COM. No. 155.

IN THE SENATE OF THE UNITED STATES.

MARCH 27, 1860.—Ordered to be printed.

Mr. BROWN made the following

REPORT.

[To accompany Bill S. 313.]

The Committee on the District of Columbia, to whom was referred the petition of certain property-holders in Washington city, praying the passage of a law to remunerate owners of property for damage sustained by changing the grades of the streets and avenues of that city, ask leave to report, as follows:

The complaints of the petitioners have been fully heard in the circuit court of the District of Columbia and in the Court of Claims, and have been reviewed by the Supreme Court of the United States, and uniformly dismissed as affording no legal claim for damages.

Anne C. Smith commenced an action before the circuit court for the District of Columbia, against the corporation of Washington, for alleged damages occasioned to her property by the grading of a street. The court dismissed the complaint, and the plaintiff appealed to the Supreme Court, and at the December term, 1857, that court affirmed the decision of the court below.—(See 20 Howard, page 135.)

John L. Wort complained to the Court of Claims that his property on North Capitol street had been damaged by the grading of that street, and as it had been done by order of Congress, he claimed indemnity from the United States. That court, in May, 1858, dismissed the complaint without taking testimony, affirming that, allowing all the petitioner said to be proved, it furnished no grounds for damages against the United States.

Charles Wilkes made a similar complaint and with like result, at the May session, 1858, of the Court of Claims. The committee append the opinion of the court on Wort's case.—(See appendix.)

Concurring in the conclusions of the court, we think that the petitioners in this case have no legal claim against the United States for damages.

Their equities, we think, are different. It will be recollected that the Government sold the ground to these petitioners, or to others from whom they derive their titles. This it did under what we regard as a stipulation that the streets were to be graded according to a then existing survey of the city. It is clear that if the survey had not been

changed, or the grades altered, the purchasers would have had no legal or equitable claim for damages. But the government did, in many instances, alter the grades, and in a way seriously to injure the lots of ground which it had sold to private parties; and having done so, we think that it is equitably bound to hold itself responsible in damages. In accordance with this view of the subject, we report a bill.

APPENDIX.

IN THE COURT OF CLAIMS.

JOHN L. WIRT *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the court.

The petitioner states the following case: He is the owner, in fee simple, of lot No. 3, in square No 685, in the city of Washington. The lot is situated on the east side of North Capitol street, in that city.

The grade of North Capitol street was fixed by the proper authority as long ago as the year 1789. It was duly laid down and recorded by Nicholas King, at that time the surveyor of the city.

Notwithstanding this grade was thus fixed and established, the Commissioner of Public Buildings, in 1824, caused North Capitol street to be cut down in order to procure earth to make the roadway around the Capitol square. He thus destroyed the original fixed grade and formed another, which the petitioner supposed was to remain as the established grade of that street. He was so informed by the surveyor of the city in the year 1842 or 1843, about which time the petitioner erected a dwelling-house on his lot, at what he was thus officially informed was the then fixed grade of that street.

About the years 1850 and 1851, a further excavation was made by the United States in North Capitol street for the purpose of procuring earth to improve Maryland avenue, and to obtain gravel and sand for Twelfth street west, reducing the grade in front of the petitioner's house so much as greatly to damage his property.

In the year 1855 a further excavation was made by the same authority in North Capitol street for the purpose of procuring earth to fill up the public reservation north of the Capitol square. The grade was then reduced to its present level, which, the petitioner is informed, is the grade fixed by Randolph Coyle, United States engineer, appointed by law "to complete and revise the grades of the city of Washington, under the direction of the President of the United States." The petitioner's house is now far above the present grade, and very seriously damaged.

The petitioner will show that the said injury and damage have been done by the authority of the United States, and under color and pretext (and, as the petitioner believes, in fact and truth) that the same was necessary for the public use and benefit; and he submits that he is entitled to ask and receive a just compensation for the value of his property thus taken away from him. The petitioner has, as often as

it became necessary, duly protested to the proper authorities that he held the United States liable, and bound to make good to him all his damages in the premises. He submits that there is an implied contract on the part of the United States to compensate and indemnify him fully in the premises; upon which implied contract (waiving any demand for a tort, if any he have) he now relies.

The petitioner states the action of Congress in his case. It was referred to this court by the House of Representatives.

Such is the petitioner's case, as set forth by him in his petition; and the question now to be determined is, whether testimony shall be ordered.

In the case of Anne C. Smith *vs.* The Corporation of Washington, (not yet reported,) the Supreme Court held, that the power given to the corporation of Washington in their charter, "*to open and keep in repair* streets, avenues, lanes, alleys, &c., &c., agreeably to the plan of the city," includes the power to alter the grade or change the level of the land on which the streets, by the plan of the city, are laid out; and that when they perform this trust, according to the best of their judgment and discretion, without exceeding the jurisdiction and authority vested in them as agents of the public, and on land dedicated to public use for the purpose of a highway, they do not act unlawfully or wrongfully. "They have not," says the court, "trespassed on the plaintiff's property, nor erected a nuisance injurious to it, and are, consequently, not liable to damages where they have committed no wrong, but have fulfilled a duty imposed on them by law as agents of the public. The plaintiff may have suffered inconvenience and been put to expense in consequence of such action; yet, as the act of the defendants is not 'unlawful or wrongful,' they are not bound to make any recompense. It is what the law styles '*damnum absque injuria.*' Private interests must yield to public accommodation; one cannot build his house on the top of a hill in the midst of a city and require the grade of the street to conform to his convenience at the expense of that of the public.

"The law on this subject is well settled, both in England and this country."

The same principle had been decided in the case of Goszler *vs.* The Corporation of Georgetown, 6 Wheaton R., 593. But it is supposed that it goes no further than merely to exempt from liability to action the corporations who exercise such a power. But this is a mistake. In such cases the principle that private property shall not be taken for public use without just compensation is inapplicable. That principle has always been confined, in judicial application, to the case of property actually taken and appropriated by the government. It does not extend to indirect or consequential damage or loss occasioned by the lawful use of property already belonging to the public. (Callender *vs.* Marsh, 1 Pick. R., 418.) And such is the doctrine in the case of Anne C. Smith *vs.* The Corporation of Washington.

A similar principle prevails in reference to the rights of co-terminous owners of land. A man has the right to dig a pit upon his own land, if necessary to its convenient or beneficial use, when it can be done without injury to the land of his neighbor *in its natural state.*

His right to dig the pit is but the right to improve his own land, and his neighbor cannot deprive him of this right by the erection of a building, the weight of which will cause his neighbor's land to fall into the pit. The doctrine upon this subject is, that in all cases in which the owner of land has not, by building or otherwise, increased the lateral pressure upon the adjoining soil, he has a right to its support, as a right of property necessarily and naturally attached to the soil. But where anything has been done to increase the natural pressure, as where buildings have been erected, no man has a right to such increased support, unless the building or other thing, which makes it necessary, is of *ancient* erection. Hence, a person may make reasonable improvements and excavations on his own land, though they should injure or endanger an edifice on the adjoining land by digging near and deeper than its foundations, provided he exercises ordinary care and skill, and the suffering party does not possess any special privileges protecting him from the consequences of such improvements, either by prescription or grant.—(Thurston *vs.* Hancock, 12 Mass. R., 221; Panton *vs.* Holland, 17 Johns. R., 92.)

In the city of Washington, the land on which the streets are laid out belongs to the United States in fee simple, and the streets are highways, which have been dedicated to the public. The power to regulate them is vested in Congress, to be exercised directly, or by such individuals or corporations as may be authorized by Congress. They may repair and amend the streets, and, for this purpose, dig down and remove the soil sufficiently to make the passage safe and convenient; and in doing so, they but exercise a power analogous to that which an individual exercises in making an improvement on his own land. Hence, any consequential loss which may result to an individual from the proper exercise of this power is "*damnum absque injuria.*" For this reason, every one who purchases a lot upon the summit, or on the decline of a hill, is presumed to foresee the changes which public necessity or convenience may require, and may avoid or provide against a loss.—(Callender *vs.* Marsh, 1 Pick. R., 431.)

In the present case, the petitioner complains of two several changes which have been made in the grade of North Capitol street by authority of the United States, and he alleges that his house has been "very seriously damaged" thereby, but he concedes that the changes were "necessary for the public use and benefit." This, in the language of the court, in the case of Smith *vs.* The Corporation of Washington, "is what the law styles '*damnum absque injuria.*' Private interests must yield to public accommodation; one cannot build his house on the top of a hill in the midst of a city and require the grade of the street to conform to his convenience at the expense of that of the public."

In the case of Callender *vs.* Marsh, 1 Pick. R., 433, the court say: "Cases apparently hard will occur; the present is such a one. The plaintiff's house has been standing twenty years, and he had reason to expect that in any contemplated improvement in the streets his liability to expense would have been attended to by the city authorities. * * * * * It may be a case very suitable for the consideration of the city authorities, whether, according to the practice in like cases of

improvements designed for the general good, necessarily creating expense to individuals, some fair indemnity ought not to be allowed; but of this they are the judges. If it is not now within the authority of the city officers, it is certainly worthy of consideration whether an application to the legislature ought not to be made to authorize them to indemnify those citizens who may, in the necessary exercise of powers used for public improvement or convenience, be made indirectly to contribute an undue proportion for those purposes; and there seems to be no good reason why others, whose property is enhanced in value at their neighbor's expense, should not be held to furnish part of the indemnity." It may be that this case, too, is one of hardship; but upon this point we can give no opinion. It has been submitted to us merely upon the petition, and our opinion is, that the facts therein set forth do not furnish any ground for relief.

No order will be made authorizing the taking of testimony in this case.